Speech by The Honourable Chief Justice Geoffrey Ma at the 2018 Supreme Court of Queensland Oration 21 May 2018 Brisbane, Queensland

Criticism of the courts and judges: informed criticism and otherwise[1]

1. It is a singularly grand honour to be asked to deliver this year's Supreme Court Oration. When Justice Glenn Martin extended the invitation to me in February last year, I was overwhelmed and had no hesitation in accepting. This Oration has had many distinguished jurists precede me. It is an intimidating thought. The Chief Justice of the High Court of Australia delivered the Oration last year[2] and she will in a few days' time deliver here in the Banco Court the Australasian Institute of Judicial Administration Oration.[3] I

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1 I wish to acknowledge the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Mr Harry Chan LLB (Hong Kong), BCL (Oxon); Mr Ted Noel Chan LLB (Northampton), LLM (University College, London) and Mr Adrian Lo LLB (Hong Kong), LLM (London School of Economics), Barrister.

2 On 16 March 2017 ("Judicial Methods in the 21st Century").

3 On 24 May 2018 ("The adaptability of the law to change").

am, however, much comforted by the thought that I am among friends, many of you old friends and that I have also had the pleasure of speaking here before.[4]

2. The topic of criticism of the courts and of judges is not a new one. People have been making criticisms for a very long time. In his stimulating book "Judges",[5] in the Chapter headed "Criticism", David Pannick[6] refers to the case of Serjeant Roo who, in 1527, composed a satire performed in Gray's Inn on the abuses of the law for which Cardinal Wolsey, then the Lord Chancellor, was said to be responsible. Roo was summarily imprisoned. The relevant context at that time (the early 16th Century) was many thought that judges were amenable to undue influence; the fact that Sir Thomas More was praised for not accepting gifts

[4] On 4 August 2012 at a seminar organized by the Supreme Court of Queensland to coincide with the opening of these Law Courts ("Duties owed to the court: fact, fiction and continuing relevance").

[5] Oxford, 1988.

[6] Lord Pannick QC.

implicitly suggested that other judges were perhaps not quite so unblemished.[7]

3. Criticism of judges, specifically of court decisions, continues to this day. You will all no doubt be familiar with the reaction of one of the popular newspapers in the United Kingdom in 1987 following the *Spycatcher* litigation in the United Kingdom, when the House of Lords upheld an injunction preventing the publication of the memoirs of a former MI5 agent[8] when they had already been published in other countries.[9] Upside down photos of the Law Lords under the banner headline "You Fools" appeared in the newspaper. More recently, again in the United Kingdom, after the decision of the English Divisional Court in the *Miller* case,[10] there were startling headlines directed against the judges of

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7 The Oxford History of the Laws of England Vol. VI (1483-1558) (Sir John Baker) at Pg. 413-4.

8 *Spycatcher*: The Candid Autobiography of a Senior Intelligence Officer.

9 *Attorney General v Guardian Newspapers Ltd* [1987] 1 WLR 1248.

10 *R (Miller and Another) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

the Divisional Court.[11] This was a case not only of immense constitutional importance in the United Kingdom, it also had political consequences over which many people held extremely divergent views. Whichever way the case was decided, the outcome in the courts was always going to be controversial between the so-called Brexiteers and those who wished the United Kingdom to remain in the EU.

4. Hong Kong has not been immune either. In recent times I have been personally attacked as well, called evil, incompetent, a person who deserves no respect and a person "dressed in a silly bib".

5. The criticism of courts and judges raises some fundamental dilemmas that are not easy to resolve and it is

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[11] Such headlines included, notably, "Enemies of the People" (Daily Mail 3 November 2016). This was described by Lord Judge, the former Lord Chief Justice of England and Wales, as being "very unpleasant". There were other headlines: "The judges versus the people" (Daily Telegraph 3 November 2016); "WHO DO YOU THINK EU ARE?" (The Sun 3 November 2016).

some of these dilemmas that I want to explore. They are easier to identify than to resolve. The difficulty lies in the fact that reasonable points of view do often proceed from diametrically opposite positions and finding some middle ground, if there is any, is often extremely hard. On the one hand, there is an imperative to uphold and maintain the dignity of the law and the necessary respect for it. This is symbolised in most statues of justice we see in almost every court around the world. The statue of Themis, with her right hand holding a sword as a sign of the authority of the law, stands outside these very courts. She stands atop the Court of Final Appeal Building in Hong Kong.[12] Nonetheless, against the authority of the law, and just as important, is the freedom of speech. Here, I wish to be clear: I am not suggesting that the judiciary, courts and the work of the courts should in any way be immune from free speech: there is no reason why they

[12] This statue holds the sword in her left hand.

should be in any way and indeed free speech often benefits the administration of justice.

6. A tension inevitably exists between these two facets. The freedom of speech, though a fundamental right, is not unlimited. In Australia, the freedom of speech (or discussion) is regarded as essential to sustain the system of government that is constitutionally mandated and is accordingly to be regarded as effectively entrenched as a constitutional right.[13] It is, however, not absolute.[14] In Hong Kong, it is stated to be a right enjoyed by residents of Hong Kong: see Article 27 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.[15] Under Article 39 of the Basic Law, the provisions of the International Covenant

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[13] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, at 48-9 (Brennan J). See also: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, at 139 (Mason J). In some States, the right is expressly set out: see s. 16 of the Human Rights Act 2004 (ACT); s. 15 of the Charter of Human Rights and Responsibilities Act 2006 (Victoria).

[14] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 561 (The Court).

[15] The Basic Law is a constitutional document promulgated by the National People's Congress under the Constitution of the People's Republic of China.

on Civil and Political Rights are to be implemented and the Covenant has legislative force in Hong Kong through the Hong Kong Bill of Rights Ordinance.[16] Article 16 of the Bill of Rights guarantees the freedom of expression but states, as does the Covenant,[17] that the exercise of this freedom carries with it special duties and responsibilities:-

> "It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –
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> (a) for respect of the rights or reputations of others; or
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> (b) for the protection of national security or of public order (ordre public), or of public health or morals."

For example, laws against hate speech and the law of defamation provide clear instances of legitimate restrictions to this freedom.

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[16] Cap. 383.

[17] Under Article 19.

7. I shall go into the limits of free speech regarding judges and the courts when dealing with the form of contempt of court known as scandalising the court. Of more interest, however, is looking more closely at the concerns or problems that may arise when the exercise of free speech results in a distortion over what the rule of law means in a society. It is this aspect that can give rise to real concern because if the rule of law itself, involving the concept of the administration of justice, is misunderstood, then the confidence of the community in the institution of the law – represented by the judiciary whose authority is symbolised in solid form by the dignity of our court buildings and statues of Themis – will be damaged. However lauded a court system is and however well it works, the absence of confidence in the system seriously undermines the rule of law and this in turn undermines society itself. A wake up call is, in these circumstances, necessary.

8. But before I discuss this aspect further, I must first say something about the offence of contempt by scandalising the court. I do not intend what follows to be a definitive or complete analysis of this form of contempt. Only a thesis would do the topic justice. I want, however, to say something about the offence in order to highlight the two facets of the freedom of speech and the administration of justice.

9. This offence is a curious one because it is just so controversial owing to the collision it has with the freedom of speech. As I have said earlier, this right is a constitutionally protected one but even where it is not constitutionally protected, it is fiercely guarded and rightly so. The controversy is further fuelled by the fact that in some jurisdictions, this offence has been abolished. It was abolished in the United Kingdom in 2013.[18]

[18] By s. 33 of the Crime and Courts Act 2013.

10. Many textbooks and commentators take as the starting point the definition of the offence contained in *R v Gray*,[19] a decision of the English Court of Appeal. The offence was defined in the following way,[20] "Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority." Notwithstanding the vagueness of this definition, prosecutions for this offence have largely involved scurrilous and abusive attacks on judges, but not always. *Gray* itself was an example of abusive remarks. In the course of reporting at a trial for obscene libel in Birmingham, a journalist (Mr Gray) wrote and published in the *Birmingham Daily Argus* an article in which the trial judge[21] was described as "the impudent little man in horsehair, a microcosm of conceit and empty headedness" and that the fact that he had been left a lot of

[19] [1900] 2 QB 36; 82 Law Times Reports 534.

[20] In the judgment of Lord Russell of Killowen CJ at 40.

[21] Mr Justice Darling.

money by a wealthy relative "spoiled a successful bus conductor". Despite apologizing for what Mr Gray recalcitrantly accepted were words that were "intemperate, improper, ungentlemanly, and void of the respect due to his Lordship's person and office", he was fined £100, with another £25 for costs and was imprisoned in Holloway Prison until the sums were paid.

11. Another case involved Lord Mansfield. John Wilkes, the 18th Century politician[22] founded the newspaper *The North Briton*. In the infamous Issue 45,[23] an article criticised the royal speech of King George III endorsing the Treaty of Paris 1763.[24] Wilkes and other publishers were convicted of seditious libel before Lord Mansfield. At this point, a publisher named John Almon (a friend of Wilkes)

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[22] Wilkes was regarded as a radical, having supported the Americans in the American War of Independence.

[23] Published on 23 April 1763.

[24] This treaty ended the Seven Years War between Great Britain and France and Spain.

published two pamphlets criticising Lord Mansfield for acting "officiously and arbitrarily". Almon was prosecuted for contempt. In the judgment of Mr Justice Wilmot,[25] it was stated that the offence of contempt is "not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people". This link to the administration of justice is an important one.

12. The third case is from Canada. The most well-known case in that jurisdiction is probably the decision of the Court of Appeal of Ontario in *R v Kopyto*.[26] Mr Kopyto issued a statement to a newspaper in relation to a decision of the Toronto Small Claims Court in the following terms:-

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[25] *The King v Almon* (1765) Wilm 243. This judgment was never delivered as a judgment because the prosecution against Almon was not proceeded with, on account of a technicality (the indictment stated "*The King v Wilkes*" when the defendant should have been Almon).

[26] (1987) 47 DLR (4th) 213.

> "This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it. Mr Dowson and I have lost faith in the judicial system to render justice.
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> We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue."

13. The prosecution for contempt did not succeed. It is an interesting case as both the majority and dissenting views of the Court are relevant. The majority was of the view that the Canadian Charter of Rights and Freedoms was decisive in that the offence constituted an impermissible limitation on the freedom of expression. The minority defined the *actus reus* of the offence was to include a serious risk the administration of justice would be interfered with and that this risk had to be serious, real or substantial. The *mens rea* was the intention to

bring the administration of justice into disrepute.[27] On the facts, the minority held that the *actus reus* of the offence had not been made out. There was no substantial risk because no right thinking member of society would take the words in the statement seriously. The relevance of referring to this case is not that the facts are particularly interesting but that the reference in the minority's judgment to the importance of the administration of justice has a certain similarity to *Almon's Case* and the reference there to "the King's justice". Also significant was the emphasis by the majority on the human rights aspect.

14. The emphasis on the administration of justice aspect is, however, most clearly demonstrated by the approach of the Australian courts regarding this offence. I have assumed that

[27] This is the *mens rea* position in Canada and South Africa (see for example *State v Van Niekerk* 1970 (3) SCA 655). This is not the position in either Australia or New Zealand (see for example *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225).

the starting point in this area[28] is *R v Dunbabin, Ex parte Williams.*[29] There, disparaging remarks were made (these were held to be "a clear contempt") against the High Court in *The Sun* by its editor. Reference was made to conclusions reached by the High Court "with that keen microscopic vision for splits in hairs which is the admiration of all laymen" and that the Court should be given some "real work to do" so that it "would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee." Rich J, who gave the first judgment of the court, said this[30]:-

> "Any matter is a contempt which has a tendency to deflect the Court from a strict and unhesitating application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence. But such interferences may also arise from publications which tend to

[28] The offence is still in existence in Australia.

[29] (1935) 53 CLR 434.

[30] At 442.

> detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

Dixon J added [31]: "It is necessary for the purpose of maintaining public confidence in the administration of law that there should be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority." Note the reference in these judgments to the importance of public confidence in the legal system.

15. In England, well before the passing of the Human Rights Act 1998 and the abolition of the offence in 2013, misgivings were already expressed by eminent judges and

[31] At 447.

lawyers about the offence. In *McLeod v St. Aubyn,*[32] Lord Morris in delivering the Opinion of the Privy Council said that "Commital for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice". On the same theme of the administration of justice but also emphasising the freedom of speech aspect, is the case, again before the Privy Council, of *Ambard v Attorney General for Trinidad and Tobago.*[33] There, the editor of *The Port of Spain Gazette* was convicted of contempt of court, fined £25, ordered to pay costs on a solicitor and own client basis and imprisoned for a month in case he could not pay the fine. The offending article which Ambard had edited was critical of the alleged disparity in sentencing by magistrates in Trinidad and Tobago for certain criminal offences with similar facts. The criticism was,

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[32] [1899] AC 549, at 561.

[33] [1936] AC 332.

however, neither abusive nor intemperate. I set out a part of what was written:-

> "It is the inequality of the sentences as fitting the circumstances of the offences that seems to often demand some comment. And if we here venture to draw attention to this, it is not by any means with the idea of confirming popular opinion as to the inherent severity or leniency of individual judges or magistrates, but simply with a view to inviting consideration of a matter that must, and in fact does, cause adverse comment amongst the masses as to the evenness of the administration of justice in Trinidad."

Your instincts about this being as far removed from being a contempt as can be were shared by Lord Atkin. In a much-quoted passage, fuelled no doubt by the facts of the case before the Privy Council, he said this:-

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary

> right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

16. The freedom of speech aspect was reiterated by the English Court of Appeal in *R v Commissioner of Police Ex parte Blackburn (No. 2).*[34] In this case, the well-known politician Mr Quintin Hogg[35] wrote an article in *Punch* magazine to the effect that the enforcement by the police of the Gaming Acts was "rendered virtually unworkable by the unrealistic, contradicting and, in the leading case, erroneous decisions of the courts, including the Court of Appeal". In dismissing the application that Mr Hogg be held in contempt,

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[34] [1968] 2 QB 150.

[35] Later to be Lord Chancellor: Lord Hailsham of St. Marylebone LC, he appeared in person in the appeal.

Lord Denning MR made a strong reference to the freedom of speech:-[36]

> "Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself."

Lord Denning then referred to Mr Hogg being entitled to exercise "his undoubted right".[37] Salmon LJ referred to the "inalienable right of everyone to comment fairly upon any matter of public importance. This right is one of the pillars of individual liberty – freedom of speech, which our courts have unfailingly upheld."[38]

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[36] At 155A-B.

[37] At 155E.

[38] At 155F-G.

17. The offence of contempt by scandalising the court has been abolished in England. The main reason for this had to be the freedom of speech angle. In the debate in the House of Lords over the proposed legislative amendment,[39] Lord Pannick QC said:-

> "There is simply no justification today for maintaining a criminal offence of being rude about the judiciary – scandalising the judges or, as the Scots call it, murmuring judges. We do not protect other public officials in this way. Judges, like all other public servants, must be open to criticism because, in this context as in others, freedom of expression helps to expose error and injustice. It promotes debate on issues of public importance. A criminal offence of scandalising the judiciary may inhibit others from speaking out on perceived judicial errors."

18. The offence, however, remains here in Australia and in Hong Kong. In Australia, the justification for the offence I would suggest is the need to take into consideration not only

[39] House of Lords debates, 2 July 2012.

the freedom of speech but also the need to uphold the authority of the courts, an administration of justice issue. The "good sense of the community will be a sufficient safeguard against the scandalous disparagement of a judge"[40] is often going to be true, but sometimes it will not. This was the very point made by Rich J and Dixon J in *Dunbabin* from which I have quoted earlier. True it is that the human rights aspect is regarded as important in Australia as it should be,[41] but I accept there comes a point when the administration of justice is so affected that something needs to be done. It is a matter of balancing the two important aspects of free speech and the impairment of the authority of the courts. This point was also made in *Gallagher*[42] where it was said (after referring to *Dunbabin*), "The law endeavours to reconcile two principles,

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[40] Gibbs CJ (together with Mason, Wilson and Brennan JJ) in *Gallagher v Attorney General* (1983) 152 CLR 238, at 243.

[41] Notably, as Mason J (who has sat as a Non-Permanent Judge of the Hong Kong Court of Final Appeal) said in *Nationwide News* at 32, "at common law no contempt is made out if all that the defendant does is to exercise his or her ordinary right to criticise, in good faith, the conduct of the court or the judge".

[42] At 243.

each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict". Then comes the critical passage, "The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges".

19. I am aware of course of the case of Sevdet Besim who had pleaded guilty in 2016 to having done preparatory acts in planning for a terrorist attack on Anzac Day in Melbourne. The controversy relevant for present purposes related to remarks made by three Government ministers as reported in *The Australian* to the effect that the courts of Victoria were light on sentencing for terrorism offences. The controversy was that these ministers were made to answer to the Court of Appeal of Victoria on a possible charge of contempt. As I understand it, this involved both a contempt

on the basis that an attempt was made to influence the court as well as a contempt by scandalising the court. I do not want to wade into this controversy; much has already been spoken and written on it.[43] I will, however, say this. I have no doubt that one of the main considerations that will have weighed heavily on the court's mind was the balancing exercise I have referred to earlier. It is one of the most difficult balancing exercises a court will have to undertake, involving the need to take into account a fundamental right as against another equally important feature (and also one in which the very institution affected by it acts as the judge).

20. In Hong Kong, the offence of contempt by scandalising the court remains in existence. There have been very few cases and these have been confined to instances of abusive remarks. The leading authority *Wong Yeung Ng v*

[43] I have found interesting and instructive the recent article written by Dyson Heydon "Does Political Criticism of Judges Damage Judicial Independence" published by the Policy Exchange, February 2018.

Secretary for Justice[44] involved the finding of contempt by the court against the chief editor of a popular newspaper in which there were what were described as "abusive, offensive and scurrilous" remarks which also contained "racist slurs".[45] The Court of Appeal had to consider how such criticisms were to be seen against the freedom of speech contained in the Basic Law.[46] It was accepted by leading counsel for the editor[47] that the term "public order" in Article 16 of the Hong Kong Bill of Rights included the due administration of justice.[48] The judgment of Mr Justice Mortimer VP contains the clearest statement of the position in Hong Kong:-[49]

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44 [1999] 2 HKLRD 293.

45 At 301F. The milder abuses included referring to judges and Obscene Articles Tribunal members as "dogs and bitches", "scumbags", "Mangy yellow skinned dogs", "stupid men and women who suffer from congenital mental retardation".

46 I have referred to this constitutional document earlier: see para. 6 above.

47 Mr Sydney Kentridge QC.

48 At 307I.

49 At 312I-313A.

> "I readily accept Mr Kentridge's point that the administration of justice in Hong Kong is held in high repute both at home and abroad. There is every reason to think that it enjoys general confidence and respect. Therefore, it has little to fear from *bona fide*, temperate, and rational criticism. Indeed, the appellate process itself involves this and yet tends to increase confidence in the system. Further, like many other public institutions, it stands to benefit from, rather than be damaged by, such criticism – especially if constructive. Nor do I think that isolated excesses of disappointed litigants or their lawyers which are neither in the face of the court nor related to proceedings either pending or in progress, ought necessarily to be condemned as scandalising contempts."

Leave to appeal to the Court of Final Appeal was refused. The Appeal Committee emphasised in refusing leave that the freedom of speech is not unrestricted and every community was entitled to protect itself from conduct aimed at undermining the due administration of justice; this was an important aspect of the preservation of the rule of law.[50]

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[50] [1999] 3 HKC 143, at 147B-C. As an aside, it is noteworthy that the practice of the Hong Kong Court of Final Appeal is to provide reasons when leave to appeal is refused.

21. The reference to the rule of law underlines the importance of the dilemmas that emerge when one is considering criticisms made of the court. It is the rule of law that is of paramount importance in this discussion and this is the correct lens through which one ought to view the question of criticisms directed at the court. We have just seen the controversial nature of the offence of contempt by scandalising the court. It is controversial because of its potential in undermining the fundamental right of the freedom of speech and this creates the dilemmas I have earlier mentioned. The controversy in the nature of the offence is demonstrated by an understandably marked reluctance to institute contempt proceedings for this offence save perhaps in the most egregious situations. A number of jurisdictions have looked closely at this offence, setting up Law Commissions.[51]

[51] For example, in Canada and New Zealand.

As I have mentioned, the offence has been abolished in the United Kingdom.

22. The fundamental problem in this area is recognising those situations when the limits of the freedom of speech are exceeded and the administration of justice is compromised to the extent that something needs to be done. When these boundaries are reached, what is the most appropriate step to take? Contempt proceedings can be an option but there is an understandable reluctance to do so as I have just mentioned and such proceedings provide only a limited solution. Apart from those matters gone into earlier, judges also regard themselves as sufficiently broad-shouldered and thick-skinned to withstand criticism. As Justice Felix Frankfurter of the

United States Supreme Court said in *Pennekamp v Florida*,[52] "weak characters ought not to be judges".

23. Criticisms of the court and of the legal system are often extremely constructive. These are welcome when they are made on an informed basis. One does not have any difficulties in accepting these and though such criticisms may be harsh at times, they are to be encouraged rather than discouraged. It is when the criticisms are not informed, meaning they ignore the fundamentals of a legal system that they can become a cause for concern. This, I emphasise, is not a freedom of speech issue. One is of course entitled to make uninformed comments but the freedom to do so does not make it right to do so. Such uninformed comments may also be harmful when members of the community become

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[52] (1946) 328 US 331. The case involved criticisms made in a newspaper directed at the handling of criminal cases as being too favourable to criminals. Justice Frankfurter was not one to hold back punches. He described the offence of contempt by scandalising the court as "English foolishness" (see *Bridges v California* (1941) 314 US 252, at 287).

confused by what they hear or read by way of criticism, and as a consequence lose confidence in the system. This is a far greater danger than the odd, isolated abuse directed at judges.

24. Now I have no doubt that most right thinking members of society will recognise pure abuse when they see it. A growing trend, however, in recent times has been the phenomenon of entirely associating the integrity of a legal system with the outcome, one way or the other, of cases determined by the courts. Some of the criticisms against the courts in recent times as well as over the years have originated from this false premiss. The courts deal from time to time with very high profile and controversial cases, and these cases can be divisive. I will give some examples drawn from cases in Hong Kong, although I am sure you will find parallels in the Queensland courts. Such cases can arise in criminal proceedings. Earlier this year, the Hong Kong Court of Final

Appeal heard the case of *Secretary for Justice v Wong Chi Fung*[53] in which the Court took the unusual step of dealing with sentencing issues.[54] In this particular appeal, three student leaders were convicted of unlawful assembly outside the Legislative Council in 2014. This case was particularly controversial as it arose out of a highly political gathering that got out of control; violence was involved. The student leaders (the appellants) were given community service orders by the trial magistrate, only to have these sentences, on a review by the prosecution, converted into immediate custodial ones. The decision of the Court of Final Appeal was to reinstate the original sentences of community service on the basis that while the Court of Appeal was right to issue new sentencing guidelines for the offence of unlawful assembly, the new guidelines should not be applied retrospectively. The result was that the three defendants were immediately released.

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[53] [2018] 2 HKC 50.

[54] Sentencing principles are usually left to the Court of Appeal.

There were criticisms of the decision of the Court of Final Appeal from all sides of the political spectrum. Many of these criticisms came from people who had not read the judgment of the Court at all (or had no intention of reading it or trying to understand the legal reasoning) but who had given their views on the integrity of the legal system based on the outcome alone. For those who opposed the students, the legal system had let society down by freeing the students. For the supporters of the students, the system had let society down because the Court of Final Appeal had sanctioned the new guidelines on tougher sentencing for the offence of unlawful assembly. The students asserted that what they did involved an act of civil disobedience.

25. On the civil side, usually in applications for judicial review, the courts have also had to deal with controversial

matters. In *Vallejos v Commissioner of Registration*,[55] the court grappled with the issue of whether foreign domestic workers could, by reason of the fact that they had ordinarily resided in Hong Kong for a continuous period of seven years, become permanent residents,[56] notwithstanding that under the Immigration Ordinance,[57] such domestic workers were classified as not being ordinarily resident for the purposes of Article 24(2)(4) of the Basic Law. The court held against the domestic workers. The reaction was loud. It is interesting to contrast the reported reactions to the result. After the decision of the Court of First Instance which was in favour of Ms Vallejos, her lawyer proclaimed, "It is a good win for the rule of law." After the result in the CFA, he is reported to have said, "The ruling is not a good reflection of the values we should be teaching youngsters and people in our society."

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[55] (2018) 16 HKCFAR 45.

[56] Under Article 24(2)(4) of the Basic Law, persons who have ordinarily resided in Hong Kong for a continuous period of not less than 7 years and who have taken Hong Kong as their permanent residence can become permanent residents.

[57] Cap. 115.

26. In *GA v Director of Immigration*,[58] the Court of Final Appeal this time had to determine whether the refusal by the Director of Immigration to allow mandated refugees and screened-in torture claimants[59] the right to work was constitutional. The constitutional challenge was unsuccessful and the Director of Immigration's position was upheld. The lawyer acting for the unsuccessful appellant is reported to have referred to the decision as "an embarrassment for Hong Kong's legal system."

27. I have referred to the reactions in these high profile, controversial cases (they were so because they originated from political and social controversies) not to target much less criticise the people who made these comments (they were

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[58] (2014) 17 HKCFAR 60.

[59] Mandated refugees are persons who have successfully established their claims as refugees to the United Nations High Commission for Refugees under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention. Screened-in torture claimants are those who are regarded as being at risk of being in danger of being subjected to torture in their home country, for the purposes of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or CAT – the Convention Against Torture). In *GA*, such persons were in Hong Kong awaiting resettlement overseas.

after all exercising their freedom of speech as they were entitled to), but in order to make the point that the mere outcomes of cases are sometimes seen by people, even by some lawyers, as *the* barometer by which the integrity of the legal system or the rule of law is to be measured. This is wrong and undesirable. I completely understand that one may be dissatisfied with a result (or satisfied with it) but to link the mere outcome of a case to the integrity of a legal system is illogical, unprincipled and unfair. This is the distortion in relation to the rule of law I referred to earlier.[60]

28. The reason why such thinking is wrong is because it leads to a distortion and complete misunderstanding of what truly represents the rule of law. The rule of law comprises essentially first, the respect for the rights of individuals (fundamental rights) and respect for the rights of others, and

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[60] In para. 7 above.

secondly, the presence of an independent judiciary to enforce these rights. It is in relation to this latter aspect where the administration of justice is relevant. These are the characteristics of the common law. Accordingly, when cases are handled by the courts, judges are looking at the enforcement of rights by applying the law. The duty and responsibility on judges is to apply the law and nothing else. The courts are not influenced by outside factors such as politics and they are not biased in favour or against any person or group. Need one really to be reminded again that all are equal before the law? The rule of law and indeed the common law are about upholding the law and its spirit of equality. It is the opposite of determining cases according to biases, whether one's own or any particular group's.

29. Occasionally, criticisms are made against judges along the lines that they are not elected. As a conceptual

argument, it has merits on both sides but very often it is deployed as a means of criticising results in court proceedings that are not to the liking of persons or groups. This can occur particularly in controversial cases.

30. In *W v Registrar of Marriages*,[61] the Court of Final Appeal determined the constitutionality of a provision in the Marriage Ordinance[62] which had the effect of excluding transsexual persons from the definition of "woman" for the purposes of being able to marry. The Court of Final Appeal decided, applying a remedial interpretation, that the term "woman" had to be read and given effect so as to include a transsexual. This was consistent with the essence of the constitutional right to marry.[63] There were strong reactions to this result, with polar opposite sides each claiming a victory or

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[61] (2013) 16 HKCFAR 112. The decision was a majority decision of 4 (Ma CJ, Ribeiro and Bokhary PJJ, Lord Hoffmann NPJ) to 1 (Chan PJ).

[62] Cap. 181.

[63] Article 37 of the Basic Law and Article 19(2) of the Bill of Rights Ordinance.

disaster for the rule of law in Hong Kong. On a matter as delicate and controversial as transsexuals, one will inevitably provoke controversy whichever way a decision is made. Some commentators questioned the right of unelected judges (as they saw it) to extend the law and said that such important matters of policy ought to be left to the legislature.[64]

31. As criticisms go, compared with those which amount to more than personal abuse, this was perhaps not so outrageous. However, while I accept that there may be cases in which courts should not determine matters of policy and leave this to others, it is important to understand the judicial process as well. Whether or not a case is a high-profile one, or involves controversial topics, or is just a run-of-the-mill one handled on a daily basis by the courts, the approach is exactly the same, and it is a principled one. The court will

[64] Indeed this was the view of Chan PJ who dissented in the appeal. He was of the view that it was not the business of the court to make new policy on social issues (at paras. 170 and 192).

simply apply the law and judges will do so adhering to their judicial oath. No regard will be paid to whether the result will or will not be a popular one (not that this can be gauged in the first place), certainly not to whether it will accord with what the majority of the community wishes. Indeed, to have regard to such matters is really quite out of the question. In particular in public law cases, the protection of core-values or core-rights and the need to adopt a principled approach, represents what I hope is a commonly held view of the public interest as far as the courts are concerned. The letter of the law matters but so does the spirit of the law. In the area of public law, fundamental rights are to be construed and applied generously.

32. On occasion, the courts will be the last refuge open to a minority in society pitted against the excesses of the majority. This is inevitable given the proper operation and

application of the law. In *W v Registrar of Marriages*, we said this[65]: "Reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights." We quoted from a paper[66] given by a former Chief Justice of Ireland, Murray CJ who said: "How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?" One can add to this a quote from Lord Mansfield CJ in *R v Wilkes*[67]:-

> "I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent …"

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65 At para. 116.

66 "Consensus: concordance, or hegemony of the majority?" in *Dialogue Between Judges 2008*, Strasbourg, European Court of Human Rights.

67 (1770) 4 Burr 2527, at 2562; 98 ER 327, at 347. This was the case which, ironically, attracted the criticisms made by John Almon: see para. 11 above.

For me, this is what is meant by a principled approach to the discharge of a judge's constitutional role: the adherence to the letter and the spirit of the law, and its proper application, protecting those who need protection. This is part of the judicial oath taken by judges in upholding the law. In Hong Kong, even a law passed by the legislature will be subject to compliance with the rights guaranteed constitutionally.[68]

33. In the 13th AIJA Oration in 2003 "The Centenary of the High Court: Lessons from History"[69], Gleeson CJ said this:-

> "Judicial review of legislative and executive action is part of the High Court's reason for being. It involves the Court in the resolution of disputes that have political significance; sometimes major political significance. Decisions on matters of that kind naturally arouse partisan feeling. That feeling is sometimes directed towards the Court. Checks

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[68] Article 11 of the Basic Law states that no law enacted by the legislature shall contravene the Basic Law. Section 6 of the Hong Kong Bill of Rights Ordinance (to which reference has already been made in para. 6 above) states that the court may grant any remedy or relief and make such order in relation to any violation of the rights contained in the Bill of Rights. The courts have in the past declared as void legislative acts.

[69] 3 October 2003 in Melbourne.

> and balances are applauded universally in theory; but people with power do not always enjoy being checked or balanced. The enthusiasm of politicians for judicial review may depend upon whether they are in Government or Opposition. The High Court never has been, and never will be, free of the certainty that some of its decisions will arouse popular resentment, and even partisan fury. That is a clear lesson of its history."

34. What I have just articulated may seem obvious to lawyers and judges but it may not be to other members of the community. There are of course those who do understand the system but choose, for whatever reason (often political) when criticising the courts, to lose sight of these fundamentals of the common law system. For the vast majority of other people within the community, it is important that they do understand. The transparency of the way justice is administered is a major factor enabling the public to see how courts and judges operate. Decisions of the courts affect people's lives and affect the community. It goes without saying that the

administration of justice must accordingly be openly conducted so that all persons can clearly see the process under which their rights or liabilities are determined. Were it not so, there is a danger that when important decisions are made – and these range from monetary liabilities through loss of liberty to important decisions affecting society as a whole – people will speculate as to the reasons how and why such decisions have been arrived at; specifically whether any outside factors have influenced the court. The independence of the judiciary becomes then questioned and this would really be very damaging for any legal system. This is the damage to the administration of justice that Rich and Dixon JJ referred to in *Dunbabin* and which the High Court of Australia referred to in *Gallagher*[70]. One cannot throw off a yoke like that. Transparency ensures that this requirement and responsibility

[70] See paras. 14 and 18 above.

to act only in accordance with the law and legal principle, can be plainly and obviously seen by all.

35. In respect of transparency, there are two facets to consider:-

(1) Openness of court proceedings. There should be no mystery as to what goes on in the courts. Apart from sensitive cases,[71] the public must be able to see the judicial process in operation. I have already referred to the Brexit litigation in the United Kingdom. After the decision of the English Divisional Court in the *Miller* case, there were quite outrageous headlines in the newspapers.[72] Such reactions were to be contrasted with the

[71] For example, cases involving children or where sensitive and confidential matters are considered (such as in applications for a Mareva injunction or an Anton Piller order).

[72] See para. 3 fn 11 above.

substantially less emotional reactions after the matter had been determined by the United Kingdom Supreme Court. One of the reasons for this muted reaction, even though the Supreme Court upheld[73] the decision of the Divisional Court, was that most people began to realize that the courts were not in any sense dealing with or deciding political issues; they were merely applying the law. People were able to see this partly because there was much better and more informed coverage of the proceedings (for example the proceedings in the Supreme Court were televised) than had been the position during the Divisional Court hearing. The openness of the proceedings helped the public to understand that the courts were merely applying the law and nothing else.

[73] By a majority of 8 to 3.

(2) The openness of proceedings in court thus enables what takes place in court to be revealed to all members of the public. This, however, is not enough because there must also be transparency in the precise way a court has decided on the outcome of a case. This is where the reasoned judgment comes into play. I believe that one of the characteristics of a common law system, indeed one of its great strengths, is the existence of the reasoned judgment. Lawyers and judges alike, not to mention law students, often complain about the length of judgments of the court[74] – some run into hundreds of pages and even more paragraphs, but whatever their length, they serve a vital function. Judgments of the court reveal in great detail every step of the reasoning that leads to the conclusion in

[74] I am reminded here of last year's Oration in which Chief Justice Kiefel said in a Jane Austen way, "I have always assumed it to be a universally held view that a judgment should be as succinctly stated as the matter allows."

any case. Everyone, and not only the parties to a case, can see precisely how a result has been reached by the court. This enables the losing party to know why he or she has lost, and therefore is able to consider whether or not to appeal. For the public, because as we know all judgments (except in sensitive cases) are made publicly available, it can clearly be seen that courts and judges decide cases strictly in accordance with the law. One may wish to criticise the legal reasoning of the courts but by making public the reasons in a judgment, there can really be no criticism along the lines that the court has decided on the outcome of a case in reliance on non-legal matters.

36. It is somewhat ironic that many misunderstandings of the law emanating from uninformed criticisms can quite

easily be rebutted merely by understanding the legal system that we have, together with the transparency of it all. Perhaps more can be done to explain just what the legal system is really about. This has over the years taxed me in my present position in Hong Kong where there are almost daily references made to the rule of law and the work of the courts. You will no doubt have ideas of your own. The challenge then is try to inform the community of these essentials of the rule of law and the common law. The responsibility falls on all of us. Only when the community understands all this can there truly be confidence in the system. And confidence in a legal system is key to its continuation.

37. The common law is not about wigs and gowns or the colourful history that dates back to English mediaeval times. It is about those fundamental principles of the rule of law I have just tried to articulate. It is these fundamental

features that ensure for the community a system of fairness and justice in the resolution of disputes, and a system that allows people to predict with some degree of certainty as they conduct their daily affairs.

38. As we look to the future, the message must be a clear and simple one: a system that is able to discharge the responsibilities and functions expected of a legal system, namely to ensure that there is justice, and where the rule of law thrives, is a system that is worth preserving and fighting for.

39. I thank the Supreme Court of Queensland again for the honour of delivering this Oration.

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